Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-053967 07/12/2011

COMMISSIONER JOHN R. DOODY

CLERK OF THE COURT
L. Slaughter
Deputy

TELUM COMMUNICATIONS L L C

JAMES M LAGANKE

v.

BRANDON LIETZ, et al.

BRANDON LIETZ
NO ADDRESS ON RECORD

BANK OF AMERICA N A
P O BOX 3609
LOS ANGELES CA 90051
MARK P HUMMELS
ALLCOM INC
NO ADDRESS ON RECORD
J P MORGAN CHASE N A
1601 N 7TH ST STE 140
PHOENIX AZ 85006
JOHN PRELL
8111 E IRAN AVE
MESA AZ 85209
CYNTHIA L SWENSON
NO ADDRESS ON RECORD
CHARLES A SWENSON
NO ADDRESS ON RECORD

MINUTE ENTRY

This is a case where a defaulted garnishee seeks relief from the judgment under Rule 60(c), subsections 1, 3 and 6.

For the reasons stated in this order,

IT IS ORDERED granting the motion for relief from Default Judgment.

On May 2, 2011, the Court entered judgment against COXCOM, Inc., dba Cox Communications of Arizona ("Cox"), in the sum of $113,824.91.

Cox is not a party to this litigation in its own right. Cox was served with a non-earnings garnishment. The record shows that Cox hired a corporate statutory agent (Corporation Service Company or "CSC") to accept service of process for Cox in Arizona. The record also shows that Cox recently (February 2011) hired a third party vendor (ADP Garnishment Services) to process Cox's earnings garnishments nationwide. This was a non-earnings garnishment but CSC mistakenly forwarded it to ADP (the earnings garnishment contractor). ADP compounded CSC's error by not returning the package to ADP, by processing the writ as an earnings garnishment, by mistakenly treating the writ as an earnings garnishment against a long-since discharged Cox employee, then by filing an answer to writ of garnishment using an earnings garnishment form and inserting the name of Plaintiff's counsel in the caption instead of the Plaintiff's name. See Answer of Garnishee filed on March 17, 2011.

The standards for evaluating a motion to set aside a Default Judgment under Rule 60(c)(1) were stated by the Arizona Supreme Court in Richas v. Superior Court, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (Ariz. 1982). In order to obtain such relief the defaulted party has the burden of showing each of the following elements: (1) that it acted promptly in seeing relief from the entry of default; (2) that its failure to file a timely answer was due to either mistake, inadvertence, surprise or excusable neglect; and (3) that it had a meritorious defense. Id.

The law favors resolution on the merits and therefore resolves all doubts in favor of the moving party. Union Oil Co. of California v. Hudson Oil Co., 131 Ariz. 285, 640 P.2d 847, 850 (1982). Thus, the trial court has broad discretion and its exercise of that discretion will not be disturbed, unless a clear abuse is shown.

That does not mean, however, that all entries of default or judgments by default will be set aside. There is a principle of finality in proceedings which is to be recognized and given effect. Camacho v. Gardner, 104 Ariz. 555, 559, 456 P.2d 925, 929 (1969). Thus, although the trial court has broad discretion to resolve all doubts in favor of setting aside the entry of default or the judgment by default, "the discretion thus vested in the court is a legal, and not an arbitrary or personal discretion. There must be some legal justification for the exercise of the power, some substantial evidence to support it." Lynch v. Arizona Enterprise Mining Co., 20 Ariz. 250, 252, 179 P.2d 956, 947 (1919). A proper showing of facts is "a prerequisite to the exercise" of

the discretion given the trial court. Smith v. Monroe, 15 Ariz.App. 366, 367, 488 P.2d 1003, 1004 (1971).

The Court does not agree that Cox should be relieved from the Default Judgment under Rule 60(c)(1). In the Court's view, the errors committed by Cox's agents were the result of mere carelessness, not excusable neglect. Sax v. Superior Court, 147 Ariz. 518, 520, 711 P.2d 657, 659 (App. 1985) ("Mere carelessness will not suffice to establish excusable neglect, nor will inadvertence or forgetfulness…. In order to establish excusable neglect, a moving party must show that he acted as a reasonably prudent person under the circumstances.")

Simply stated, no reasonable excuse was offered for the negligence of CSC or ADP. As agents of Cox, the negligence of CSC and ADP is imputed to Cox. See generally Restatement, 2d, Agency, section 219, Master liable for servant's torts when tort committed in the course and scope of employment (here CSC and ADP were clearly acting within the course and scope of their agency with Cox); Restatement, 2d, Agency, section 232, failure of a servant to act may be conduct within the scope of employment when the principal owes a duty to injured person that the agent shall act (in this case Cox owed the judgment creditor a duty that its agents – CSC and ADP – would process the creditor's garnishment paperwork in a non-negligent manner; and Restatement, 2d, Agency, section 243, a master is subject to liability for physical harm caused by the negligent conduct of servants within the scope of employment.

However, the Court does find that Cox is entitled to relief from the judgment under Rule 60(c)(3), for misconduct of counsel for Plaintiff. By "misconduct," the Court need not find (and the Court makes no finding one way or the other) that counsel acted unethically. Estate of Page v. Litzenburg, 177 Ariz. 84, 93, 865 P.2d 128, 137 (1994) ("Misconduct" for purposes of this rule "need not amount to fraud or misrepresentation, but may include even accidental omissions.")

In this case the Court finds fault with three omissions by Plaintiff's counsel. First, on April 7, 2011, counsel spoke with a representative of the Cox legal department, paralegal Yvonne Hayes, without disclosing to Ms. Hayes that he already filed a motion for an order to show cause against Cox. It is true that he discussed some aspects of the case, but he clearly did not give Ms. Hayes a full picture of the means and consequences he had already set in motion to make Cox liable for the full amount of the judgment. Second, at the order to show cause hearing on May 2, 2011, counsel failed to disclose to the Court Ms. Hayes' explanation of how the process broke down and her assurance that Cox would reprocess the garnishment immediately. Third, counsel failed to disclose to the Court at the same hearing that Cox mistakenly filed the answer on an earnings garnishment form naming Plaintiff's counsel as a party. It is true that the Court could have looked through the docket to find that Response (filed on March 17, 2011). It is also true that the prior answer was included in a list of recitals in the Default Judgment itself,

but the Court did not focus on that particular paragraph while signing the order presented to the bench by counsel at the conclusion of the hearing. The bottom line is that these facts – the bungled answer and the information from Ms. Hayes – individually and collectively were material facts which likely would have caused the Court to pause before entering a six figure judgment against Cox. Traditionally, Courts have always relied on counsel to disclose all material facts to the Court when asking the Court to make any ruling, particularly one of this magnitude. That obligation is at the heart of counsel's role as an officer of the Court.

Separate and apart from the finding that Cox is entitled to relief from the judgment under Rule 60(c)(3), the Court also finds that Cox is entitled to relief from the judgment under Rule 60(c)(6) under the principles articulated in Webb v. Erickson, 134 Ariz. 182, 655 P.2d 6 (Ariz. 1982). The amount of the judgment against Cox is $113,824.91. By contrast, the amount owed by Cox to the Judgment Debtor was only a tiny fraction of that sum. See Motion To Set Aside Default Judgment, Exhibit 5 (according to this affidavit, Cox owed the judgment debtor less than $1,000). The Court finds under Rule 60 (c) (6) that would be manifestly unjust to make Cox pay the entire amount of this judgment, without a hearing on the merits, without any stake in the merits, where, as here, even if the mishaps by Cox's agents did not meet the standard under Rule 60(c)(1) they were innocent, and where, as here, the amount of the judgment is many times the amount that Cox would have had to pay as garnishee.

Based on the foregoing,

IT IS ORDERED vacating the judgment entered against Cox on May 2, 2011.

IT IS FURTHER ORDERED that Cox shall file a proper answer to Plaintiff's Writ of Garnishment not more than 20 days after this order is filed.

ALERT: eFiling through AZTurboCourt.gov is mandatory in civil cases for attorney-filed documents effective May 1, 2011. See Arizona Supreme Court Administrative Orders 2010-117 and 2011-010. The Court may impose sanctions against counsel to ensure compliance with this requirement after May 1, 2011.